No. 3696

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHANG SIM and CHANG YET,

Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

BRIEF FOR APPELLANTS.

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Statement of the Case.

These two appellants, Chang Sim and Chang Yet, seek to enter the United States as citizens thereof, they being foreign born sons of a citizen of the United States.

Chang Sim arrived at the Port of San Francisco on the SS "Korea Maru" July 22, 1919, whereas Chang Yet arrived November 30, 1919, at the same port on the SS "Nanking". Their applications were denied by the Immigration authorities and this denial was sustained upon appeal by the Acting Secretary of Labor. A petition was filed in the lower

court for habeas corpus (T. R. 2-8), an order to show cause was issued (T. R. 9) to which the Government responded by a demurrer (T. R. 11); on the hearing of this demurrer the Immigration records were filed and deemed a part of the petition, which was to be tested by the demurrer (T. R. 12); the demurrer was sustained (T. R. 13). From this order a notice of appeal and petition for the allowance of appeal (T. R. 14-15), together with assignment of errors (T. R. 16-18) were filed and presented and an order was made allowing said appeal (T. R. 19-20). By stipulation and order (T. R. 21-22) the original Immigration records were withdrawn from the lower court and filed in the clerk's office of this court.

The testimony in support of the claim of relationship in this case shows without question that the father was a citizen of the United States, that he was in China at a time necessary to render the paternity of these appellants possible and throughout all of his various examinations before the Immigration authorities it appears that he has consistently claimed these appellants as his sons. The testimony before the Immigration Service of the two appellants, their father and their supporting witnesses was singularly free from any discrepancies or inconsistencies of a material character. Such variations as existed were trivial and were not deemed sufficiently detrimental to the cases of these appellants to have caused a denial to be entered. During the course of the examination conducted in the case

of Chang Sim he was ordered paroled by the Immigration authorities and remained at liberty for some considerable period of time. The appellant Chang Yet subsequently arrived at this Port and after certain papers had been received from Manila the cases were set for final hearing, which resulted in a denial and the order of parole was at that time revoked and the appellant Chang Sim was returned to the custody of the respondent.

The reasons for the denial before the local service and before the Acting Secretary of Labor at Washington, which caused them to refuse to land these appellants are two in number, and the propriety of these two reasons is challenged in this habeas corpus proceeding.

The first matter had to do with what is alleged to be an unauthenticated copy of a report of a Board of Special Inquiry at the Port of Manila, Philippine Islands, dated June 25, 1906. No record of the testimony was apparently taken or preserved. Appellants contended before the court below and contend here that this record was improperly admitted in evidence and should have been excluded as a basis for any unfavorable consideration of the cases of these appellants.

The second adverse feature considered by the Board and the Acting Secretary of Labor was an affidavit made by the father of these appellants some seven years ago at a time when he contemplated bringing one of his sons to this country. Through

a mistake of a Chinese interpreter or an attorney in Fresno, the facts relating to the first and second sons were confused and a photograph of a boy other than that of the son in question had been inadvertently, through the mistake of the interpreter or the attorney, placed upon the affidavit. It is contended that the father's explanation of this matter was so convincing and so reasonable that it was an abuse of discretion to disregard the same.

The above two features are alleged as elements of unfairness and constitute two of the points to be considered upon this appeal. The third and last point has to do with the conclusiveness of the evidence presented upon behalf of appellants showing their right to be admitted into the United States as citizens thereof.

Argument.

First.

That the court below erred in holding that the unauthenticated copy of a report of a Board of Special Inquiry at an Immigration hearing at Manila in the Philippine Islands, was competent evidence, and notwithstanding its not being authenticated and without the evidence upon which the report was based, was sufficient to discredit these appellants, their father and their supporting witnesses and cause the denial of their application to enter the United States.

SECOND.

That the court below erred in holding that in rejecting the explanation of the father of appellants regarding the circumstances surrounding the 1914 affidavit of the father sufficient legal ground existed to discredit the father and the appellants and their supporting witnesses and reject the applications of the appellants to enter the United States.

THIRD.

The court below erred in holding that the evidence presented upon behalf of these appellants to enter the United States was not of such legal sufficiency and weight as to be an abuse of discretion upon the part of the Immigration authorities and the Acting Secretary of Labor in refusing the appellants admission into the United States as citizens thereof.

First. Upon the competency of the unauthenticated copy of what is supposed to be a report of a Board of Special Inquiry at an Immigration hearing at Manila, Philippine Islands of June 25, 1906, I desire to direct attention to the recent decision of the Supreme Court of the United States in the case of *Kwock Jan Fat v. White* (253 U. S. 454; 40 Sup. Ct. 566), wherein the court held in the concluding portion of its decision:

> "The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power

> to be administered not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information, not less of the Commissioner of Immigration and of the Secretary of Labor than for the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

It is to be observed that the Supreme Court has clearly laid down the rule that it is incumbent upon the Immigration authorities to preserve a complete record of their proceedings as much for the enlightenment of the court as for their own purposes. This document, which purports to be a copy of a report of a Board of Special Inquiry held at Manila, is not authenticated, it is entirely in typewriting, it does not bear a signature or verification, and while certain testimony was given, apparently no record or copy thereof was filed in this case. Whether it was preserved or whether any record was ever made of it is unknown; it was, and is, the vital point in this case. An examination of the record amply supports this assertion. The Immigration record of these

cases which contains the memorandum for the Assistant Secretary dated April 17, 1920, and April 29, 1920, amply supports this view, and comments and draws from this report from Manila. That report is in vital contradiction of the sworn testimony of the father in these cases. The father testified here that he never testified or made any statement at all before the Immigration authorities in Manila, yet the Department at Washington find that he did testify. The only foundation for that assertion is this unauthenticated report. If the father did testify there the transcript of his testimony should have been produced and not the official summary of what they deem the situation probably called upon him to represent. It is apparent from reading this entire report, from Manila which, by the way, obviously covers a large number of other cases, and was undoubtedly made up after the hearing itself had terminated as to all of the many applicants for admission, that these officers may have been in error in their recollection as to whether or not this father testified before them or they may have presumed from the surrounding circumstances that he stated certain facts as true, whereas according to the sworn testimony of the father in this proceeding he never made any statement before the Manila Immigration authorities at all. Here is a plain and determinating conflict between the father's sworn testimony here and an unauthenticated copy of a supposed report of a Board of Special Inquiry at Manila which refers to testimony, but does not

submit evidence upon which the report is supposed to be based. We contend that this clearly comes within the rule laid down by the Supreme Court in *Kwock Jan Fat v. White,* supra, and that this case should be reversed as that case was reversed because a full record was not preserved of the Immigration hearing in question. The Supreme Court has laid down the rule that it is essential and it is obligatory upon the Immigration authorities to preserve a full record and for failure so to do the hearing rendered was unfair and the writ was directed to issue returnable before the court below for a trial on the merits. The decision concludes as follows:

> "The practice indicated in Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369, is approved and adopted, the judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to the District Court for trial of the merits. Judgment reversed. Writ of habeas corpus to issue."

Attention is directed to the report of September 29, 1919, page 48 of the Chang Sim record, by the Chairman of the Board wherein he directs the return of this case to Fresno for the further examination of the father as to this Manila episode. Attention is also directed to the examination of the father on October 6, 1919, pages 53 to 50 of the record, which contains the father's explanation of this matter. It is so reasonable and convincing as to admit of no doubt of the truth of his statement. Certainly this cannot be ignored and set aside by an unauthenticated and unsigned copy of a report which recites

the testimony was taken but does not submit it with the record.

Second. Upon the question of the affidavit of 1914 of the father made in support of the application of Chang Yick to enter this country, attention is directed to the report of Inspector Butler of August 27, 1919, page 33 of the Chang Sim record, wherein he calls attention to the existence of this affidavit in the Immigration files, and states the father should be confronted with it. The examination of the father with respect to this matter took place on September 11th, and comprises pages 39 and 37 of the Chang Sim record. The following is an extract from pages 39 and 38 thereof:

> "Q. What explanation have you to offer in regard to this discrepancy?
>
> A. It was this way, I had a cousin named Gen Chin, who formerly lived in Fresno, he claimed to know all about making out landing papers, I wanted to bring my oldest son to this country so I gave him the facts as to the births of all my children, my photographs and those of my son. He had a lawyer here named Crichton, who is the Chinese lawyer in this town, get up the affidavit. After they had it all fixed, they called me to the office to sign it. The same day I signed, I was called to San Francisco. There were no photographs pasted on it as yet when I signed it and as I could not read English I didn't know what was on that paper. The lawyer said it was all right, so I signed it. When I returned from San Francisco two weeks later, I was given a copy of it to send to my son in China, but as soon as I got it I saw they had not put my son's photograph on it. I got an interpreter to read it to me and through him found

> out that it was all wrong. In giving the date of birth of my oldest son they had put a date that about corresponded to the date of my second son's birth. I spoke to Gen Chin about it, and he said the lawyer had made the mistakes. I went to the lawyer and he said that he had put in just what Gen Chin had told him. He said the day I went to see him that he had already sent a copy to the Government office at San Francisco. They did not prepare any paper for my witness and I have been told that this Chinese lawyer, Mr. Crichton, mixed up everything he does just the same way he mixed up my business."

An examination of the Immigration file will show that this affidavit was mailed to the Immigration office in San Francisco by Attorney Crichton, that it was placed in the Immigration files with the information that nothing would be done with it until the boy arrived at this Port. No fraudulent purpose could be predicated upon such affidavit. Applicants for admission are not landed upon such papers which merely form the foundation for the trying and exacting examination which takes place after they arrive at the Port of admission. That affidavit was made out in 1914, and the father did not bring his son to this country until five years thereafter, or in 1919. The record does not disclose any attempted fraud upon his part. His statements were open to challenge if they were not true. Attorney Crichton is living in Fresno today just as he was at that time and there is an Immigration inspector permanently detailed for duty in Fresno, and had there been any question about the correctness of the father's state-

ment, or about placing the responsibility of this mistake upon Attorney Crichton, it certainly was the duty of the Immigration officials, before rejecting the father's explanation to go to Attorney Crichton and take a statement from him. This is not a case where the father makes a statement that cannot be refuted or examined into or challenged by the Immigration authorities; exactly the contrary is the case, the responsibility for this mistake was laid upon Attorney Crichton, who was then, and is now, in Fresno, and is well known as being an attorney who handles a large part of the Chinese business there. The Immigration officials had during all of that time, and still have a permanent inspector detailed in that city, and who is quite familiar with this condition, and before the Immigration authorities were warranted in setting aside the father's explanation it was their duty, and the obligation rested upon them, to go to Attorney Crichton and take a statement from him as to the father's assertions in this matter. These Immigration officials are investigating officers, and they do not discharge their duty by simply taking the testimony of a witness. When the truth or falsity of that witness's testimony is subject to verification, as was the case here, it certainly was incumbent upon the Immigration officers and was their bounden duty in the premises to investigate the truth or falsity of the statement of the father before they attempted to disregard it. Attorney Crichton was there in Fresno and was presumably well known to the Immigration inspector who

lives there, and a statement could, and should have been taken from him before any attempt was made to reject the father's explanation.

The court held in Lee Kan v. U. S. (62 Fed. 914), at page 920, as follows:

> " * * * The burden of proof is on the person seeking to land, and the character of the facts which he must prove, the time which they must have existed, and the witnesses by whom proved, together with the possibilities of counter proof inevitably suggested, make deception impossible, except under a very negligent administration of the law."

It will be noted that this court clearly and positively pointed out *"the possibilities of counter proof inevitably suggested"*, thus clearly and indisputably indicating that it was incumbent upon the Immigration officers themselves to examine into the possibilities of counter proof which the circumstances of any given case might indicate. In U. S. v. Chin Len (187 Fed. 544), at page 550, the Circuit Court of Appeals for the Second Circuit held as follows:

> "The case is much stronger than many of the reported cases where the Chinese persons, seeking entrance, endeavored by the testimony of witnesses to establish their citizenship. In the present case that fact had been judicially determined by the finding of a competent tribunal. The inspector was not justified in arbitrarily disregarding this judgment. He could prove it to be invalid or fraudulently issued, but he could not treat it as a nullity upon mere suspicion and conjecture. He was bound to treat it as valid until its invalidity was established. The rele-

> vant question of fact was presented so far as the commissioner's judgment was concerned, or, indeed, upon the question of identity."

The foregoing case referred to the effect of a judgment that it could not be ignored or treated as a nullity upon mere suspicion and conjecture and that it must be treated as valid until the invalidity was established. In the case at bar the point is not based upon a judgment, it is based upon the sworn testimony of the father, which is not contradicted or impeached by anything in the record, and it is, therefore, contended that the explanation being reasonable and satisfactory in itself was entitled to be accepted as the truth until the invalidity of the explanation could be shown by testimony. The way to test the explanation was open to the inspector at Fresno where the transaction took place and where Attorney Crichton, whom the father charged with the responsibility of the mistake, resided. The Immigration officials could not ignore this reasonable explanation and treat it as false in furtherance of any whim or caprice of their own. They had the power to test its truth by themselves questioning Attorney Crichton, whom the father charged as being responsible for the "mixup". The Government officers seemed to feel that it was not incumbent upon them to test the truth of the father's statements at all, but they simply ignored them and that obviously because the father was a Chinaman. They certainly would never have treated the testimony of a white witness in any such way. This

court held in Woey Ho v. U. S. (109 Fed. 888), at page 890 as follows:

> "A court is not at liberty to arbitrarily and without reason reject or discredit the testimony of a witness upon the ground that he is a Chinaman, an Indian, a negro, or a white man. All people, without regard to their race, color, creed, or country, whether rich or poor, stand equal before the law. It is the duty of the courts to exercise their best judgment, not their will, whim or caprice, in passing upon the credibility of every witness. The question whether a witness is credible must ordinarily be determined by the tribunal before whom the witness appears, and in the decision in which that tribunal must necessarily be vested with a very wide discretion. In weighing the scales, the conduct, manner, and appearance of the witness, as seen by that tribunal, often forms an important factor in enabling courts, as well as juries, to determine whether or not the witness is entitled to credit. Appellate courts are, in the very nature of the case, deprived of the opportunity to apply this test, which in a doubtful case might control the judgment of the trial court."

It is to be noted that the Immigration inspector at Fresno who conducted the examination of the father was apparently satisfied with his explanation, and he is the only one who came in direct or personal contact with the father in this matter. He being satisfied, and the record does not indicate the contrary, there exists no reason or ground for the officers who afterwards exercised, let us say, appellate functions, to disregard and ignore this most reasonable testimony, particularly when they know that their officers had neg-

lected every opportunity to test the truth of his explanation, when the method and manner and the witness was immediately available and subject to their examination. The doctrines enunciated in the Woey Ho case, last mentioned, have been re-affirmed by this court in the recent case of Yee Chung v. U. S. (243 Fed. 126, 130). One of the cases cited in this last mentioned case is that of Woo Jew Dip v. U. S. (192 Fed. 471), where at page 474, the Circuit Court of Appeals for the Fifth Circuit held as follows:

> "The right of appeal to this court is unquestioned, and the appellant is entitled to our conscientious judgment. See Gee Cue Beng v. United States, 184 Fed. 383, 106 C. C. A. 493, and authorities there cited. On the evidence, we find no sufficient reason to assign perjury to the appellant and his witnesses, and without such assignment we are bound to take their evidence as practically undisputed. The case itself and certain circumstances developed by the evidence may engender some suspicion, even doubt, on the main proposition, but these deportation cases are civil, and not criminal, in their nature (U. S. v. Hung Chang, 134 Fed. 19-25, 67 C. C. A. 93, and cases there cited), and therefore to be decided by the preponderance of the evidence, even if, as is so strenuously contended, the burden of proof is on the person charged with alienage, but asserting citizenship to prove his citizenship. There cannot be any question that here the evidence in favor of the appellant outweights all that can be claimed to the contrary by the United States. On the evidence Woo Jew Dip is a citizen of the United States. United States v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890."

Third. Upon this point we contend the evidence was of such conclusive kind and character that it was an abuse of discretion to have disregarded it. That such a ground is sufficient in point of law to afford relief has been upheld by the Supreme Court in *Tang Tun v. Edsell* (223 U. S. 673, 681, 682; 32 Sup. Ct. 359, 363; 356 L. Ed. 606), and that august tribunal has already decided that even an adverse action of the Secretary must find adequate support in the evidence, *Zakonaite v. Wolf* (226 U. S. 272, 274; 33 Sup. Ct. 31; 57 L. Ed. 218).

In the case at bar it is to be noted that the Board of Special Inquiry were so satisfied with the conclusive nature and character of the evidence presented upon behalf of this applicant that they did on October 15, 1919 (Immigration record, page 57), direct the parole landing of the appellant Chang Sim, during the time that it was necessary to send to Manila for the Immigration record mentioned in the first part of this brief. It is unprecedented in the Immigration service to so land a person upon parole unless the evidence presented in its case is so satisfactory in its nature as to forecast a favorable decision. It must be borne in mind that this recommendation of parole and the order of parole was made with full knowledge of the father's explanation about the Manila episode and with full knowledge of the prior affidavit which formed the subject of the discussion of the second point of this brief. The denial of these cases in the face of the conclusive showing of the evidence that the relation-

ship existed was predicated and considered solely by reason of the Manila episode and the matter of the affidavit, which forms the first and second subjects discussed in this brief. This is shown by the finding of the Board which comprises pages 71 and 72 of the Chang Sim Immigration record, and is also shown by the finding of the Board in the Chang Yet record. The review of the evidence in this case made for the Acting Secretary of Labor on the appeal to that official shows that the adverse action is based quite exclusively upon these two propositions. The attorneys for the appellant before the Department filed their brief which is dated April 28, 1920, and it is shown that their brief is virtually confined to these two same matters. An oral hearing was accorded before the Acting Secretary and the final memorandum prepared on April 29, 1920, and their final decision is as follows:

> "In re Chang Sim and Chang Yet.
> Memorandum for the Acting Secretary:
> Attention is invited to the summary of April 17th, at marker, The applicants' local attorney has since reviewed the record and submitted a brief in their behalf, which is attached next hereinunder. The bureau has read same, but it does not believe that the arguments advanced therein are sufficient to overcome the unfavorable features in the case. This is particularly true with respect to the attempted explanation of the mixup with reference to the affidavit submitted in 1914. The alleged father claims now that the photograph appearing thereon is not that of his alleged son, and was attached by mistake, and his testimony indicates that he had knowledge of such mistake ever since it was made. He has

never, up to the present proceeding, attempted to rectify the mistake or to advise the Government regarding same so that its record could be straightened out. Presuming his explanation of the Manila episode to be the correct one, he is in the position of having in the past been a willing party to a fraud practiced upon the Government, which naturally tends to discredit his testimony at this time.

The Bureau has carefully gone over this record, but does not believe that the status of the applicants has been established to a degree sufficiently convincing to justify their admission as American citizens. It is accordingly recommended that the appeals be dismissed:

(Signed) Alfred Hampton, Assistant Commissioner General.

Attys. Ralston & Hott.

May 24, 1920,

Appeal dismissed.

(Signed) John W. Abercrombie,
Acting Secretary.

Oral hearing before Acting Secretary:

Present: Acting Secretary,
Mr. Hott, of Counsel,
Mr. Sisson } Bureau of Immigration."
Mr. Booth }

From the foregoing it appears that after the oral hearing based in this matter the Acting Secretary dismissed the appeal on May 24, 1920, upon the two dominating issues mentioned in the first and second points. The Acting Secretary virtually accepts the explanation of the father as to the Manila episode, but seems to lay particular stress upon the matter of the affidavit, the Acting Secretary holding that

> "he has never, up to the present proceeding, attempted to rectify the mistake or to advise the Government regarding same so that its record could be straightened out."

In this connection it is to be noted that this father is not educated in the English language, he could not read himself, it was not obvious to him that any wrong had been done the Government in any sense, no person could attempt to land as his son save that they would have to go to the father himself to be examined as a witness in his behalf and the father would certainly not testify for any person who was not his son, hence it was not apparent to the father how the interests of the Government were prejudiced or injured in the slightest by this affidavit which was made out in 1914. The father's explanation of this matter is too reasonable and conclusive in its effect to have been disregarded and held up as legally sufficient and denied its appropriate effect. Attention is directed to the fact that this father appeared before the United States Consul General at Hong Kong presumably on April 19, 1907, and made a statement before Stuart J. Fuller, the American Vice and Deputy Consul General, when he registered before him as an American citizen, in which he gave a complete description o his family, naming his wife and her place of residence in China, together with the names and birth dates of his three children in which are included these two appellants. This certificate is over the hand and seal of the American Vice and Deputy Consul General. The original doc-

ument is used as an exhibit in this case and is to be found in Exhibit "C", page 12. This document in itself is the strongest possible evidence of the bona fides of these cases, and is an absolute repudiation of the pretentions of the Government with respect to the family that was landed at Manila on June 25, 1906.

The father's explanation with respect to this family is to show that they were theatrical people who staid in Manila two or three months on a theatrical tour and then returned to China, thus showing that no harmful effect resulted and that no fraud was perpetrated upon the Government. What purposes to be a certificate which concludes the report of the Board of Special Inquiry shows that actors and actresses were deemed as members of the exempt classes and were admitted at Manila for temporary purposes. The record shows that these people came to Manila as actors and actresses, stayed in Manila, two or three months, and doubtless having finished their theatrical tour, returned to China. The father tells in his explanation that he thought that these people might have injured him by representing themselves as members of his family, and when he went back to Hong Kong he appeared before the American Consulate and made his registration as an American citizen and gave the name and residence of himself, his wife, and the names and birth dates of his three children.

What purports to be this unauthenticated copy of a hearing before a Board of Special Inquiry is also

contained in Exhibit "C". This obviously covers a large number of cases and only case 14 refers to the father of these appellants, while cases Nos. 15, 16, 17, and 18 refer to the women concerned in this Manila episode. The large number of cases admittedly considered by this Board of Special Inquiry would necessitate that some permanent record was made of the hearing of this case, and if any testimony was taken the same should have been submitted; if no record was made of that testimony it is obvious that this long report could not have been contemporaneously made covering all of these many cases. Certainly there should have been some authentication of this document to prove its genuineness and the testimony reported to have been taken should have been reduced to a permanent record for the use of the Immigration officials and also the court. We feel that the positive nature and character of this evidence is such that it cannot be ignored, overlooked or set aside, and that the matters relied upon by the Government are legally incompetent and insufficient to sustain their adverse action.

In finally submitting this matter I feel that the said decision of the Supreme Court in the case of *Kwock Jan Fat v. White,* supra, absolutely controls. The citizenship of these appellants is a sacred and a valuable thing to them and should not be set aside for any such legally insufficient reasons or pretenses as seemed to have been indulged in by the executive officers in this matter. The Supreme Court said in the Kwock Jan Fat case:

> "* * * It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

I feel that the general principles therein enunciated should prevail and control in this case.

Dated, San Francisco,
October 1, 1921.

Respectfully submitted,

GEO. A. MCGOWAN,
Attorney for Appellants.